U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 November 2005

Case No.: 2005–LDA–00083

OWCP No.: 02–136883

In the Matter of:

CHAD E. PROFFITT,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.
Employer, and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
Carrier for Employer.

Appearances: Paul Cox, Esq.
For the Claimant

Jason Schoenfeld, Esq.
For Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

On April 23, 2004, Claimant, Chad E. Proffitt, brought this claim for compensation under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq*., extended by the Defense Base Act, 42 U.S.C. § 1651 (together, "the Act") against his employer, Service Employers International, Inc. ("Employer" or "Service Employers"). The undersigned set a hearing for November 7, 2005. On November 1, 2005, the parties jointly moved to waive the formal hearing in lieu of the submission of briefs limited to stipulated facts, issues, and exhibits. On November 4, 2005, the parties submitted their stipulated facts and thereafter their separate hearing briefs and exhibits.

The parties agree to enter into evidence: indemnity check stubs, Claimant's Exhibit ("CX") 1; and an accident report, CX 2. The parties also agree to enter into evidence: Claimant's personnel file, Employer's Exhibit ("EX") 2; Claimant's prior employment records, EX 4; Claimant's wage and tax records, EX 5; Camp Discovery medical records, EX 7; Kellog, Brown,

and Root ("KBR") Accident Report, EX 8; original and amended LS-206, EX 9; June 10, 2005 correspondence, EX 10; and June 21, 2005 correspondence, EX 11.

The following findings are based on a complete review of the joint stipulations and evidence, the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. For the reasons set forth below, the undersigned grants Claimant's request for benefits.

STIPULATIONS

The parties stipulate and I find:

1. This court has jurisdiction under the Act.

2. Claimant began working on April 23, 2004 at Camp Discovery D–1 in Iraq as a laborer foreman.

3. Claimant injured his right knee on August 9, 2004 while Camp Discovery was under mortar attack.

4. Claimant gave notice of his injury to employer on August 9, 2004, the same day as the injury.

5. Claimant sought medical treatment at the camp and was later sent back to the U.S. where he had arthroscopic surgery to repair his right knee.

6. Claimant and Service Employers terminated their employee/employer relationship on September 20, 2004. Claimant returned to the U.S. on or about September 22, 2004.

7. Claimant has been and still remains disabled, as he has not yet reached maximum medical improvement.

8. Employer or Carrier began paying benefits to Claimant on September 22, 2004.

ISSUES

1. What is the proper computation of Claimant's average weekly wage and corresponding compensation rate?

2. Is Claimant entitled to attorney's fees and penalties?

FINDINGS OF FACT

In addition to the stipulations, the following facts are evident from the record:

1. Camp Discovery is located near Baghdad in central Iraq. Employer's Brief ("EB") at 2.

2. Claimant's average weekly wage while working for Service Employers in Iraq was $1,534.43, or $23,893.25 up until the time he was injured and $33,335.32 including time after the injury. CX 1 and EB at 2.

3. Claimant was working for Service Employers, a subsidiary of KBR, at the time of the injury. EX 8 and CX 2.

4. Claimant's assignment duration for Service Employers was twelve months. EX 2 at 12.

5. From November 1, 2003 to April 22, 2004, Claimant worked for J & J Maintenance as a general maintenance worker earning $13,096.68, total. EX 2 and 4.

6. From August 9 to October 31, 2004, Claimant worked for Snow White Linen as a general laborer earning $3,105.96 total. EX 2 and 4.

7. Between September 22, 2004 and May 31, 2005, Employer or Carrier paid benefits of $431.93 per week to Claimant. EB at 2.

8. After May 31, 2005, Employer increased those benefits to $514.05 per week. EB at 3.

9. Claimant was paid no benefits between January 12 and March 1, 2005, though the deficiency was paid at the $431.93 rate. EB at 11.

10. At the time of the mortar fire, Claimant was removing rubble and doing clean-up operations. EB at 2.

11. Claimant's injury occurred while he was running for cover during the mortar attack. He tripped in a depression, damaging his Achilles' tendon. EB at 2.

12. Claimant worked for Employer in support of the U.S. Army. EX 2 at 44.

13. Claimant applied for and obtained a Defense Common Access card. EX 2 at 47.

14. Claimant applied for and obtained a travel authorization from the U.S. Army. EX 2 at 53.

15. Claimant's injury is both temporary and total. EB at 2.

DISCUSSION

Section 901 and Calculation of Average Weekly Wage

The Act bases the injured employee's average weekly wage on whether the injured employee worked in the same employment, for any employer, for the year before the injury. 33 U.S.C. § 910 (a) and (b). If so, the Act bases the calculation on the average daily wage of a worker in that class. 33 U.S.C. § 910 (a). If not, the Act bases the calculation on the average daily wage of a worker in the injured employee's new class as if he had worked in that class for the whole year. 33 U.S.C. § 910 (b). However, the Act also provides that if either of these two

methods cannot be fairly and reasonably applied, then the average weekly wage should be based instead on some combination of the daily wages actually earned by the injured employee in both the class in which he was injured and prior classes and those earned by similar workers in the same classes. 33 U.S.C. § 910 (c).

Here, during the year before Claimant's injury he worked for twenty-two weeks and four days at J & J Maintenance as a maintenance worker; he worked for twelve weeks at Snow White Linen as a general laborer; and finally he worked for fifteen weeks for Service Employers as a laborer foreman. A foreman is "a [person] in charge of a group of employees in an industrial plant or in construction work" (*Ballentine's Law Dictionary* (3d ed. 1969)); whereas a "worker" or a "laborer" is merely one who "does work and is not in charge of others." *Webster's II New Riverside University Dictionary* (1984). Absent evidence as to the specific tasks involved in each of these jobs, the only substantive information available is job title. Therefore, Claimant's employment during his injury was in a managerial class, different from that before his injury.

Further, Employer employed Claimant in what amounts to a combat-zone at the time of his injury. No evidence has been presented that he worked in a particularly safe area. To the contrary, Claimant's job was to support the U.S. Army, he was injured during an enemy mortar attack, and Employer was willing to pay Claimant a 322% differential over his prior salary to entice him to work there.[1] Equating his work in Louisiana to his work outside Baghdad is disingenuous and equivocal. Even if his job as a foreman were identical to his job as a laborer, its location inside a combat zone makes it different. For instance, to be qualified to work in a combat zone one must be able to: quickly get out of the way of enemy mortar fire, obtain a Defense Common Access card, and obtain a U.S. Army travel authorization.[2] Therefore, apart from being merely more dangerous, a war-zone is additionally at least minimally more secure. Because Claimant was able to meet these minimal safety and security requirements, whereas many laborers would not, Claimant's job with Employer is inherently of a higher class than his prior work.

Section 910(c) is appropriate only when analyses under the other two sections are inappropriate. See *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980)(explaining that 10(c) is applied "when application of the mathematical formulas provided in sections 10(a) or (b) would be unreasonable or unfair, or when insufficient evidence is presented at the hearing to permit proper application of section 10(a) or (b)"). Here sufficient evidence is provided to show Claimant's salary while working both abroad and in the U.S. Although his specific salary

[1] To arrive at this percent, sum his prior salary at both jobs ($16,202.36) divided by the number of weeks worked at both prior jobs (~ 34) to get his average weekly wage during this time ($476.54), then divide his wage with Employer by this number ($1,534.43/$476.54).

[2] As employer states in its hearing brief, "[t]he reason for the difference is because while working overseas, claimant was entitled to 'uplifts' or bonuses, for such things as hazard pay, work area differential, and foreign service, that had the potential to, and actually did, greatly increase claimant's wages from what he made previously in the United States." See Employer's Brief at 5 [internal citations omitted].

Apart from merely doing the same job in a new location, the place and tenor were substantially different, requiring many skills not required of U.S. bound workers. Therefore Employer's contention that, "[c]omparing what claimant earned while overseas to what he earned [in the U.S.] is simply not fair" is well taken, except that Employer's conclusion is backward. The proper conclusion is that having been subjected to the very injury for which he was additionally compensated, Claimant is entitled to injury benefits exclusive of his prior non-hazard, non-secure pay.

does not provide evidence on "similarly situated workers," it does provide ample evidence of what Claimant would have earned had he remained in Iraq for his full assignment duration. There is no evidence that his work is limited to anything but that assignment duration; for instance, that there would be insufficient work to fill twelve months or that Claimant's performance would lead to his early termination. Under *Marshall v Andrew F. Mahony Co.,* 56 F2d 7433 (9th Cir. 1932), section 910 (c) applies where employment is casual, irregular, seasonal, intermittent, and discontinuous. Here none of these is the case. Claimant was hired to do a definite job, for a regular duration and period, spanning four seasons, continuously. Because Claimant's position was certain and using his own wages is a reasonable and fair way to calculate his wages, section 910 (b) applies.[3]

Because Claimant's job required more safety and security skills than his prior employment and because he worked as a foreman and not as a laborer, section 910 (a) does not apply. Because his job was certain and using his own wages is fair and reasonable, section 910 (c) is unnecessary. Because it is fair to use a claimant's own wages in the absence of evidence by the employer that those wages were unduly inflated, section 910 (b) does apply.

Claimant's Average Weekly Wage

Section 910(b) of the Act provides the injured employee's average weekly wage is calculated differently depending on whether he is a five or six day per week worker. 33 U.S.C. § 910 (b). The average annual wage for six-day workers is three hundred times the average daily wage of an employee in the same class working for substantially the whole prior year in the same place. *Id.* The average weekly wage for five-day workers is two hundred and sixty times the average daily wage of an employee in the same class working for substantially the whole prior year in the same place. *Id.*[4]

In the absence of a stipulation, timesheets, or affidavit showing how may days per week Claimant worked while in Iraq, the undersigned finds that he worked a standard five-day work week. Therefore for purposes of this analysis, Claimant was a five-day worker. Also, absent evidence of what other foremen working in Iraq at the time made, all calculations herein are based solely on Claimant's salary while in Iraq. Applying the formula from section 910 (b), Claimant's average weekly wage for purposes of the Act is $1,534.45, as requested by Claimant.

Under the Act, a claimant's compensation for temporary total disability is sixty-six and two thirds per centum of the average weekly wage. 33 U.S.C. § 907 (b). Here, sixty-six and two thirds of $1,534.45 is $1,022.95 in weekly compensation, and that amount is granted.

Interest On Past Due Benefits.

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in*

[3] No employment is guaranteed, and that is not the standard indicated by the cases Employer cited.

[4] Employer's contention that because Claimant's wages overseas are not taxed (a contention not proven by evidence) makes it unfair to use the overseas wages exclusively is illogical and unsubstantiated, and is therefore dismissed. Whether Claimant had to pay tax on his wage is irrelevant to the employer's obligation to pay it.

part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by the Employer, if any, should be included in the District Director's calculations of amounts due under this decision and order.

Penalties

Claimant's vague, unsubstantiated, and unsupported request for "penalties" is herein denied. Claimant failed to even cite the section under which that request was made.

ORDER

Accordingly, it is ORDERED:

1. Employer shall pay $591.02 per week for the weeks between September 22, 2004 and May 31, 2005, for underpayment. The total is $21,276.72 for thirty six weeks.

2. Employer shall pay $508.05 per week for the weeks between May 31, 2005, and November 18, 2005 for underpayment. The total is $12,193.20 for twenty four weeks and three days.

3. Hereafter, Employer shall pay $1,022.95 per week for all subsequent weeks until Claimant's benefits under the Act terminate.

4. Employer shall pay interest on all underpayments based on the weekly average one year constant maturity Treasury yield as published by the Federal Reserve System for the week preceding the date of judgment.

5. Within thirty days of receipt of this decision and order, Claimant's counsel shall file a fully supported and itemized fee petition and shall serve a copy thereof on Employer's counsel. Employer's counsel shall then have ten days to respond.

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Russell D. Pulver
Administrative Law Judge